

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

RICHARD P., et al.,	)	
Plaintiffs	)	
	)	
v.	)	CIVIL ACTION NO. 03-390 ERIE
SCHOOL DISTRICT OF THE CITY	)	
OF ERIE, et al.,	)	
Defendants	)	

HEARING ON MOTIONS TO COMPEL  
(COURT ORDERS)

Proceedings held before the HONORABLE  
SEAN J. McLAUGHLIN, U.S. District Judge,  
in Courtroom C, U.S. Courthouse, Erie,  
Pennsylvania, on Thursday, September 16, 2004.

APPEARANCES:

EDWARD A. OLDS, Esquire, appearing on behalf of  
the Plaintiffs.

JAMES T. MARNEN, Esquire, appearing on behalf of  
the Defendants.

DANIEL J. RODGERS, Esquire, Erie County Court  
Solicitor, appearing on behalf of Erie County.

KENNETH A. ZAK, Esquire, Assistant City  
Solicitor, appearing on behalf of the City of  
Erie Bureau of Police.

Ronald J. Bench, RMR - Official Court Reporter

P R O C E E D I N G S

(Whereupon, the following Excerpt of Proceedings occurred on Thursday, September 16, 2004, in Courtroom C.)

ORDERS

THE COURT: All right, these are orders. Starting with document number 20. Presently pending before the court are various motions, discovery related motions in this case. The first motion is plaintiffs' motion to compel production of documents, document number 20, directed at the school district and the individual defendants. A full recitation of the facts driving these motions is unnecessary given the hour and a half or close to it oral argument which we just had. In any event, with respect to document number 20, insofar as request number one is concerned, that motion is granted with the proviso that in supplying the answer to the documents forming the basis for request number one, that all personal identifying information that may be contained in those documents relative to third parties, that is to say other students, etc., be redacted.

With respect to request number nine, this requires a bit more explication. The defendant objects primarily to request number nine on the basis that the information sought, to the extent that it seeks information concerning complaints, investigations, documents, reports, that involve sexual

1 harassment, bullying or sexual abuse, submitted by other  
2 students, faculty members or administrators, from September 9,  
3 1999 through July 31, 2002, is irrelevant and not calculated to  
4 lead to the discovery of admissible evidence. Essentially, the  
5 defendant argues that this is exclusively a Title IX claim;  
6 consequently, this information is irrelevant. First, on the  
7 question of relevance, having carefully reviewed the amended  
8 complaint, I find first that it does not state a substantive  
9 due process claim. See D.R. v. Middle Bucks Area Vocational  
10 Technical School, 972 F.2d 1364 (3rd Cir. 1992). DeShaney v.  
11 Winnebago County DSS, 489 U.S. 189 (1989).

12 That having been said, issues that would typically  
13 drive a 1983 claim, that is, whether or not there was a custom  
14 or practice on the part of the supervisory personnel to  
15 deliberately indifferent conduct is not implicated or in play.

16 There is pled a separate claim under the Equal  
17 Protection Clause. The defendant argues that discovery  
18 predicated on the equal protection claim is inappropriate,  
19 inasmuch as the Title IX claim as a matter of law subsumes the  
20 equal protection claim. For reasons set forth more fully in  
21 conjunction with our discussion on the record, I agree. See  
22 DiSalvio v. Lower Merion High School District, 158 F.Supp.2d  
23 553 (E.D.Pa. 2001). Pfeiffer v. Marion Center Area School  
24 District, 917 F.2d 779 (3rd Cir. 1990). In a Title IX claim  
25 the essential elements are as follows:

1           (1) That the alleged harassment was so "severe,  
2 pervasive and objectively offensive" that it derived the  
3 plaintiff of "access to educational opportunity or benefits  
4 provided by the school";

5           (2) The funding recipient had "actual knowledge" of  
6 the sexual harassment;

7           (3) The funding recipient was "deliberately  
8 indifferent" to the harassment.

9           It is clear that the elements insofar as a Title IX  
10 claim are focused exclusively on conduct and issues surrounding  
11 the very claim at issue. For that reason and particularly  
12 given my previous rulings relative to the 1983 claims, I find  
13 that complaints concerning other students are irrelevant. And,  
14 in fact, in the context of a Title IX claim would likely run  
15 afoul of Rule 404, character evidence rule. That having been  
16 said, however, I find myself in disagreement with the  
17 defendants to this extent. The defendants have requested  
18 that -- bear with me one second -- actually, Mr. Marnen, maybe  
19 I'll let you articulate this for me because I want to make sure  
20 I get it right. First of all, for the record, when I indicated  
21 that other complaints about bullying or harassment perpetrated  
22 by others, I want to make it clear that I'm talking about other  
23 individuals perpetrating harassment being called to the  
24 attention of the school administrators, I'm not talking about  
25 other complaints about these alleged harassers that would have

1    been perpetrated on individuals other than these plaintiffs.  
2    That having been said, though, in your papers you ask that you  
3    not be required to produce, if there were any, complaints about  
4    the alleged perpetrators here, which predated your clients'  
5    arrival at the school, is that right?

6               MR. MARNEN: Yes, your Honor, I think I did.

7               THE COURT: All right. That's all I needed to know.

8               MR. MARNEN: As it relates to these particular  
9    plaintiffs.

10              THE COURT: It's that point with which I disagree.  
11    Any information from, I think it was 1999 on, concerning  
12    complaints registered by other students and/or parents  
13    concerning inappropriate behavior of the same nature that  
14    drives this lawsuit, should also be turned over. Because, in  
15    my view, it is at least potentially relevant on issues which  
16    would include deliberate indifference and possibly  
17    inferentially, although I do not decide the issue conclusively,  
18    notice.

19              MR. MARNEN: Complaints about these assailants, your  
20    Honor --

21              THE COURT: Only these assailants. Then there's  
22    also the plaintiffs' motion to compel information from the  
23    County, concerning which we also had a discussion here today.  
24    The record will reflect that that information essentially  
25    involves four broad categories: juvenile court records, police

1 reports, psychological evaluations and school records.

2 With respect to psychological evaluations, in my  
3 view those are irrelevant to any issue that drives this case  
4 and need not be turned over. But if they do contain any  
5 information which would reveal either information impacting on  
6 the question of notice to the school district of a danger or  
7 threat posed by the particular alleged assailants and/or any  
8 statements made by any of the alleged assailants concerning the  
9 conduct which forms the subject matter of this case, it would  
10 be my direction that the document be turned over but in  
11 redacted form.

12 Insofar as school records are concerned, the only  
13 information relative to -- the only information contained in  
14 the records relative to the assaults, the alleged assault which  
15 gives rise to this action, or prior complaints concerning the  
16 conduct of the alleged assailants insofar as it might impact on  
17 the question of notice, only those issues, to the extent that  
18 they do exist in the school records, need be turned over.

19 With respect to the police reports, once again, and  
20 this holds true for every batch of documents that's being  
21 ordered to be produced, any redacted personal identifying  
22 information relative to any third party should be redacted.  
23 Although, I take it that these police reports are focused  
24 primarily, if not exclusively, on the subject matter of the  
25 assaults which form the subject matter of this case, that would

1 be the parameter of what should be turned over. If there is  
2 other information in the police reports, either involving third  
3 parties completely unrelated to this or any other type of  
4 information that does not impact or relate to the conduct of  
5 the assailants in this case or notice to the school district  
6 concerning the alleged propensities of the assailants, that  
7 information need not be turned over and can be redacted.

8 Let me also say for the record in fashioning this protective  
9 order, I have considered the case of Pearson v. Miller, 211  
10 F.3d 57 (3rd Cir. 2004), which, among other things, held that a  
11 state confidentiality statute such as those that are in play  
12 here, including the Juvenile Act, do not create an evidentiary  
13 privilege that is binding on a federal court. That having been  
14 said, Pearson goes on to make the point that it is appropriate  
15 that a judge in resolving a discovery dispute fashion an  
16 appropriate protective order if possible on a case-by-case  
17 basis. So, for the record, I state that I have carefully  
18 considered the balancing factors set forth in Pansy v. Borough  
19 of Stroudsburg and, in my view, notwithstanding the lack of  
20 consent from the parents in this case, the other factors  
21 militate in favor of the type of limited production which I  
22 have ordered here today. Insofar as the concern voiced by Mr.  
23 Zak on behalf of the city, primarily the city detectives is  
24 concerned, as it might relate to officers' testimony at  
25 depositions or for that matter any individuals, any individual

1 in a position of administrative authority, at deposition, at  
2 time of trial or during discovery, rather, for purposes of  
3 discovery the same rule that I've indicated that should apply  
4 with respect to the redaction of personal identifying  
5 information should also apply with respect to the utilization  
6 of the names at deposition. All of this is by way of saying  
7 that with the personal identifying information redacted, I can  
8 see no reason why anything in this case needs to be sealed.  
9 So that's my order. Now, to clean this up a little bit --

10 MR. RODGERS: Excuse me, your Honor, the court  
11 records regarding the transcription of actual juvenile  
12 proceedings, court orders, disposition orders, is another  
13 category, I'm not sure if your order addresses that or not?

14 THE COURT: Is that a separate category?

15 MR. RODGERS: That's correct, your Honor.

16 THE COURT: And all of those court records are of  
17 course sealed?

18 MR. RODGERS: Correct, under the Juvenile Act.  
19 Actually, the transcripts probably are not actually  
20 transcribed, they're probably just the court reporter's  
21 notes --

22 THE COURT: What would the transcription be  
23 comprised of?

24 MR. RODGERS: It would basically be the court  
25 proceedings and any record during the actual file, it would be

1 copies of orders by the juvenile judge regarding disposition of  
2 the three assailants.

3 THE COURT: Have you seen those?

4 MR. OLDS: I guess the only purpose of either the  
5 court orders, I'd like to see the document sheet, which I  
6 haven't seen. The court orders or the transcripts might  
7 contain information or statements by the assailants concerning  
8 the school district, so that's why --

9 THE COURT: So that's really what would be your only  
10 interest in seeing, then, that makes that easy. To the extent  
11 that -- the only information that will be required to be  
12 produced, once again, with my caveat about the redaction of  
13 personal identifying information, would be any information that  
14 might reflect or suggest, potentially lead to the discovery of  
15 relevant evidence, on the issue of the school district's notice  
16 of the propensity of that particular individual to have  
17 committed the conduct which forms the subject matter of this  
18 suit. Now, what I would suggest then is this. First of all,  
19 is there anything unclear about what I've just said?

20 MR. OLDS: I just have one question. When you  
21 talked about the County producing police records, were you also  
22 including with that any records that might have been created by  
23 probation officers that contain statements --

24 THE COURT: It's more properly broadly than that.  
25 As a matter of fact, I presume that the County and the City

1 share the same police record in this case, is that right?

2 MR. RODGERS: Correct, your Honor.

3 THE COURT: At least insofar as the County is  
4 concerned, it's somewhat more broader than that, if I didn't  
5 say it. It would involve probation officers records, too.  
6 But, once again, I presume that Mr. Zak may have those anyways.

7 MR. ZAK: Your Honor, just for clarification, if I  
8 may. I was just going through the police report itself. Does  
9 your order encompass redacting third persons, such as  
10 contributors of information and also include the assailants  
11 themselves?

12 THE COURT: I think for present purposes, and that's  
13 a good clarification, Mr. Zak, by the way. I think for present  
14 purposes as we move through this, and we'll see what happens at  
15 time of trial -- the victims themselves, of course, any third  
16 parties and the assailants, notwithstanding the fact that, and  
17 that can be done by however you choose, that could be done I  
18 presume by letter. Notwithstanding the fact the names of the  
19 assailants, the alleged assailants, are already part of the  
20 public record. But I see no harm as we go forward in doing  
21 that.

22 MR. MARNEN: So we're to redact all three things,  
23 victims, assailants and third parties?

24 THE COURT: Actually, certainly two. But I'm  
25 thinking out loud on this other issue. Given the fact that the

1 assailants' names have already appeared in several pleadings in  
2 this case, I think some of them prepared by you, I'm not sure  
3 if, Mr. Marnen, you used the names or not?

4 MR. MARNEN: I have, too, your Honor.

5 THE COURT: I guess the only thing I'm somewhat  
6 uncomfortable with here -- the more I'm thinking about it,  
7 isn't this horse out of the barn?

8 MR. MARNEN: I think so, your Honor.

9 THE COURT: I do, too. I truly do, I don't want to  
10 get back into a situation of going back and trying to seal  
11 records, I think it becomes unmanageable. Let me clarify it  
12 again for you then. The redactions should involve any third  
13 parties not involved and the individual victims themselves.  
14 Now, what I'm going to do, the orders I've put on the record  
15 here now, obviously, are somewhat, are much different than the  
16 broad orders that were appended to some of these.

17 MR. MARNEN: Your Honor, I don't mean to be  
18 argumentative, but the inclusion of the victims in redaction,  
19 I'm not sure the plaintiff would insist upon that, quite  
20 frankly, it doesn't make a lot of sense to me since I know who  
21 they are, too, the case is all about them.

22 MR. RODGERS: Actually, the plaintiffs have already  
23 put the full names in some of their pleadings.

24 THE COURT: You have. I was looking at the caption  
25 and I had presumed that -- how old are these children?

1 MR. OLDS: They would be 15 now, 15 and 16.  
2 Actually, they aren't in any of the pleadings. If they are in  
3 the pleadings, it's inadvertence, we used their first name and  
4 their last initial.

5 MR. MARNEN: I guess I would withdraw that then.

6 THE COURT: Do it that way. Anyways, getting back,  
7 before I finish up here, is there anything else, any other  
8 questions?

9 MR. MARNEN: I have some clarifications.

10 THE COURT: Go ahead.

11 MR. MARNEN: Your Honor, you ordered that the County  
12 must produce school records, but limited to the alleged assault  
13 and the prior complaints concerning the conduct of the alleged  
14 assailants. Is it proper in going further that you want me to,  
15 on behalf of the school district, limit my production of  
16 records concerning the alleged assailants to those kinds of  
17 records and not produce educational records and things like  
18 that?

19 THE COURT: That's right. Because my understanding  
20 is, after speaking with Mr. Olds, he has no interest in it and  
21 I couldn't see why he would.

22 MR. MARNEN: All right. One other point of  
23 clarification. As you went round robin, you didn't discuss the  
24 City concerning their records specifically and I take it that  
25 when you discussed police records, you meant to discuss the

1 City, also?

2 THE COURT: I did. When I said police records, I  
3 was referring to the City. Mr. Olds, do you have something?

4 MR. OLDS: Just one point. If names are redacted --  
5 if identities are redacted, the issue that we brought to the  
6 court's attention about the record might contain a witness that  
7 we need to contact, would that be without prejudice to come  
8 back to you to try to get the identity of that witness?

9 THE COURT: I'm not resolving that issue here today  
10 because, as a practical matter, this could all be, we might be  
11 just tilting at windmills if there's nobody there anyways. And  
12 if and when that comes out, then that would require notice to  
13 them or their guardian, that is a whole separate third party  
14 issue, we can handle that when it comes up.

15 MR. MARNEN: One more thing, your Honor. May we  
16 agree upon the use of some codes for these individuals, pure  
17 redaction I think would be confusing?

18 THE COURT: When I said redaction, I didn't mean,  
19 for instance -- well, you would lose the sense of the sentence  
20 for one. Yes, you can agree on it any way you want.

21 MR. MARNEN: First names, last initials, just like  
22 the plaintiffs and defendants --

23 THE COURT: I should think. But whatever you agree  
24 on, don't agree on so much that it compromises the identity,  
25 that's all I can tell you, however you want to do it.

1 MR. MARNEN: Do we have an agreement here it's first  
2 name and last initial?

3 MR. RODGERS: Yes.

4 MR. OLDS: Okay.

5 THE COURT: So, let me just double check one thing  
6 here. So, for the record, then, for the reasons set forth on  
7 the record, document number 20, motion at number 20; motion and  
8 document at number 10; motion and document at number 16; are  
9 granted in part and denied in part for the reasons set forth on  
10 the record. And my suggestion to you would be, because I'm not  
11 going to memorialize anything further than what I've just done,  
12 if you want to refresh your recollection, that you order a  
13 transcript for purposes of going forward from here, all right.

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15 (Whereupon, at 3:25 p.m., the proceedings were  
16 concluded.)

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I, Ronald J. Bench, certify that the foregoing is a  
correct transcript from the record of proceedings in the  
above-entitled matter.


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Ronald J. Bench

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